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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ESTATE OF ERNEST GOTTDIENER,
ET AL.,

Plaintiffs,
v.

13 CV 1824 (LGS)

FELIX SATER AND SALVATORE
LAURIA,

Defendants.
-----x

New York, N.Y.
July 16, 2013
12:24 a.m.

Before:

HON. LORNA G. SCHOFIELD,

District Judge

APPEARANCES

MUNDIE LAW FIRM

Attorneys for Plaintiffs

BY: FREDERICK M. OBERLANDER, ESQ.

and

THE LAW OFFICE OF RICHARD E. LERNER, P.C.

BY: RICHARD E. LERNER, ESQ.

BEYS, STEIN & MOBARGHA, LLP

Attorneys for Defendant Felix Sater

BY: JOSHUA D. LISTON, ESQ.

NADER MOBARGHA, ESQ.

SATTERLEE, STEPHENS, BURKE & BURKE, LLP

Attorneys for Defendants in 2010 case, BayRock LLC,
BayRock Spring Street LLC, BayRock Whitestone LLC, BayRock
Camelback LLC, and BayRock Merrimac LLC

BY: WALTER A. SAURACK, ESQ.

ZOE E. JASPER, ESQ.

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(In open court)

(Case called)

THE COURT: We're now moving to the third case, which is 13 CV 1824. It's estate of Ernest Gottdiener versus Sater, and there are only two defendants here, Felix Sater and Salvatore Lauria, as I understand it. And given that, the other counsel are welcome to stay, but the other counsel are also welcome to leave because we're going to address just this case now.

With respect to this case, I understand that service was made and counsel has appeared, in some sense, for both defendants, but you are not showing up as having entered an appearance on ECF. So if I could just ask you to do that, that would be great.

MR. MOBARGHA: Yes, of course. We will file a notice of appearance within the next 24 hours.

THE COURT: Thank you. So if I could ask the plaintiff again, what is this case about, and how is this different from the two that we talked about already?

MR. OBERLANDER: Complete -- Well, I can't say it's completely unrelated. Six degrees of separation. We could find something. Roughly from '93 to '98, pervasively in the Southern District but with tendrils that reached out to a lot of others, including the Eastern District, a very great many bucket shops or basically crooked, fly-by-night stockbroker

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1 operations popped up that were, in varying degrees, associated
2 with generally Italian organized crime or the Mafia, however
3 you call it, sometimes Russian and sometimes both.

4 There was a great deal of litigation in the early part
5 of this millennium, 2000 to 2005, all over the Eastern and
6 Southern District, dozens of cases. This is basically a civil
7 residue of one of them. In this case, there was -- obviously,
8 I'll be very careful. These are allegations, but they're also
9 taken directly from criminal informations to which people have
10 pled guilty and indictments to which people have pled guilty
11 and, therefore, they're more than mere allegations. They're,
12 at least as to the indictments, true with probable cause.

13 There was an association in fact RICO enterprise
14 consisting of some 20, 25 people. Among them were Felix Sater,
15 Salvatore Lauria, Alfred Palagonia, quite a few others. It
16 doesn't matter. Now, the general overall objective of that
17 racketeering enterprise was to perpetrate securities fraud,
18 specifically by getting customers to buy stocks not knowing
19 that the brokerages and their buddies in the association
20 secretly controlled large blocks.

21 And these proverbial little old ladies would be
22 induced with high-pressure boiler room sales tactics into
23 buying stock, not knowing the truth, not knowing that brokers
24 were being bribed to promote it. And then, of course, it would
25 be run up and sold into, and they'd be left with worthless

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1 stock. And it's called pump and dump, and the details of it
2 are really almost unimportant. But that's essentially what
3 we're talking about, pump and dump, boiler room securities
4 fraud.

5 Now, my client --

6 THE COURT: And so is it, more or less, I mean,
7 separate than from the other actions?

8 MR. OBERLANDER: Yes. It doesn't have to stay that
9 way, but I'm not trying to be deceptive to you.

10 THE COURT: No, no, no.

11 MR. OBERLANDER: The damages claim --

12 THE COURT: I'll to be clear to you, I haven't been
13 able to put all of the complaints together to sort out what is
14 what. So I was hoping you might just make that simple for me.

15 MR. OBERLANDER: Absolutely. Here's what we got.
16 Mr. Sater did some bad things. Whether he reformed or not is
17 beside the point. He did some bad things; so did Mr. Lauria,
18 and they pled guilty to doing them in 1998. That's when they
19 pled guilty. The things that they did were during the five
20 years before that, '93 to '98, roughly.

21 Now, all those other cases deal with what happened
22 after 1998. They deal with what happened when Mr. Sater, while
23 he was serving as a cooperator, infiltrated and acquired the
24 majority ownership of BayRock and used it to commit crime, and
25 people who facilitated that and covered it up for him, that's

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1 what those cases are about.

2 In this case, we're dealing with some elderly people,
3 Holocaust survivors who entrusted a large part of their life
4 savings to brokerages in 19 -- or to one broker during '93 to
5 '98 and lost money.

6 THE COURT: Okay. I got it. Thank you.

7 MR. OBERLANDER: All right? Now, obviously, they have
8 claims, the Gottdieners, against people who joined a conspiracy
9 after the securities fraud and kept it going 15 years to hide
10 the truth from them. That's why they're plaintiffs in the case
11 Mr. Sater removed. So what happened here is that these are
12 the -- this case is the Gottdieners suing Mr. Sater and
13 Mr. Lauria in civil RICO for the losses they suffered in
14 securities fraud from '93 to '98. That's what this case is
15 about.

16 But they could have and should have got their money
17 back by suing them a lot earlier. They should have got
18 restitution a lot earlier. They didn't. They have claims
19 against a lot of people who, after the securities fraud, acted
20 with the specific intent of frustrating them and all the other
21 victims. That's the 3905 case we dealt with first.

22 This is strictly the case about the -- I mean, I could
23 have pled it. Yeah, I could have enjoined it all over the
24 place.

25 THE COURT: I understand.

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1 MR. OBERLANDER: In this case, we have the Gottdieners
2 suing Mr. Sater and Mr. Lauria because they lost \$7 million in
3 securities fraud. Now, the wrinkle here, and I'm sure my
4 colleague will bring this up to you and we agree on a lot,
5 believe it or not, trust not on the law. The wrinkle here is
6 that the damage that was done to them in the securities fraud
7 seems -- and don't hold me to this, but at the latest, to have
8 occurred in 1998, certainly not long after that. We're dealing
9 with damages that accrued to them 15 years later.

10 The cause of action didn't accrue civilly against
11 Mr. Sater until 2009 because civil RICO provision Title 18
12 1964-C says that no one may bring an action for RICO by relying
13 on conduct that would be actionable as securities fraud unless
14 and until there's been a conviction. In which case, the
15 statute of limitations, which everyone agrees is four years,
16 begins to run when the conviction becomes final.

17 It is our position that the phrase "conviction becomes
18 final" wasn't redundant for the hell of it; that while a
19 conviction may be said to have occurred upon entry of a guilty
20 plea, a conviction becomes final only when the judgment and
21 conviction order is docketed and/or time for appeal expires.

22 Mr. Sater was sentenced on October 23rd, 2009.
23 Presumably, he had -- if he hadn't waived appeal, he had 14
24 days from there; so somewhere around October, November 2009
25 Mr. Stater's conviction became final. There must be several

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1 hundred cases on the phrase "conviction becomes final." When
2 does finality occur? Most of them are in the habeas context,
3 obviously, because of the one-year limitation there.

4 There is no case in history that has ever held that
5 conviction becomes final when somebody enters a plea of guilty
6 particularly because, among other things, when you're subject
7 to a cooperation agreement, if you violate it and commit
8 crimes, guess what? Everything changes, and it's all done all
9 over again.

10 So we brought this case with respect to Mr. Sater
11 pursuant to a quirk in the law that is there for real,
12 unambiguously clear, that starting October 23rd, 2009, for the
13 next four years, everybody he is liable to from 15, 20 years
14 ago can first sue him. As to Mr. -- in RICO, nothing else
15 that we know of but in RICO.

16 Mr. Lauria, his conviction became final in
17 February 2004, but his case didn't exist in public records
18 until it was, for want of a better term, unsealed by order of a
19 magistrate for Judge Glasser on March 22, 2009. So the
20 earliest that anybody could have known his conviction became
21 final was March 22, 2009. And we filed this case on
22 March 18th, 2013.

23 And our position with respect to Mr. Lauria is that
24 the statute of limitations had to have been tolled during the
25 entire time everything was being kept secret, concealed,

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1 sealed, whatever you want to call it. You can't hold
2 plaintiffs to knowing about something where the courts have
3 gone out of their way to make certain that nobody did.

4 THE COURT: Let's -- We've been here a long time.

5 MR. OBERLANDER: But that's the facts.

6 THE COURT: I understand, and I have your pre-motion
7 letters. And we don't need to have oral argument before
8 anybody files any papers. So would you like to be heard?

9 MR. MOBARGHA: Yes. One thing that I just want to
10 address in this conference is, if there's any pleading
11 deficiencies or statute of limitation issues that the
12 plaintiffs are about to address, and they've hinted at that in
13 their letter, that they would maybe like to amend their
14 complaint to --

15 THE COURT: I thought somewhere he said he wasn't
16 amending one word of his complaint.

17 MR. OBERLANDER: Want me to answer or --

18 THE COURT: Well, let --

19 MR. MOBARGHA: The reason why --

20 THE COURT: Yes, let me hear you.

21 MR. MOBARGHA: The reason I bring this up is if we
22 were to file a motion to dismiss, which we are going to do --

23 THE COURT: Right.

24 MR. MOBARGHA: -- we would like to make sure that the
25 complaint we're going to be dismissing won't be amended, making

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1 our motion moot. It's, therefore, for efficiency purposes we
2 can actually just dismiss the complaint that the plaintiffs
3 actually are going to stick by at this point. This will just
4 make it more efficient for the Court and all the parties
5 involved.

6 I'm not going to get into all the rebuttals for what
7 plaintiff has mentioned, but basically, this case is, as
8 plaintiffs have admitted, is over. It's about 15 to 20 years
9 old and the statute of limitations is four years. And while
10 securities fraud, the statute begins to run when the conviction
11 is final, we believe that that was when he entered a plea of
12 guilty back in 1998. Therefore, the statute of limitations for
13 Mr. Sater and Mr. Lauria expired in 2002.

14 What the position the plaintiffs are taking here is
15 that defendants' ten years of unparalleled cooperation with the
16 Eastern District somehow should act as a toll to continuously
17 toll their -- the time they have to file whatever civil RICO
18 action that they want to. I don't think that was the intent of
19 the statute, but we can get into that in the papers. I don't
20 want to waste the Court's time any more than we already have.

21 But I just want to get into, though, is while
22 securities fraud has a specific way of calculating the statute
23 of limitations issue, they still need another predicate act for
24 civil RICO. And through their correspondence, it seems that
25 they're hinting that the second predicate act that they're

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1 basing their civil RICO claim on is bribery. And bribery,
2 unfortunately for the plaintiffs, still, the statute begins to
3 run when plaintiffs discovered or should have discovered that
4 their economic loss could be attributed to this bribery.

5 So whether the conviction is final or not for the
6 second predicate act is irrelevant. The statute begins to run
7 back when the plaintiff should have discovered their injury.

8 And the other reason I wanted to bring up the
9 potential amendment of their complaint is because, you know,
10 civil RICO, the pleading standards for civil RICO are very
11 onerous. And basically just attaching the conviction of
12 Mr. Sater and Lauria for their White Rock -- alleged White Rock
13 criminal enterprise and imputing all of those actions onto
14 Blair and Palagonia, who were the actual brokers who sold the
15 securities to the plaintiff, is not enough. And there's cases
16 that say you can't just basically base a civil RICO on some
17 loose narration that's attached.

18 They actually have to tie the facts to the elements.
19 So if they want to do that, I'm happy to wait for them to do
20 that in an amended complaint, but I just want to make sure
21 that, you know, at this point, that they either make a decision
22 to file an amended complaint or I can just move to dismiss
23 their current complaint as it is.

24 THE COURT: Okay. Thank you. So I'll hear from the
25 plaintiff. I mean, I do have a procedure whereby the plaintiff

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1 can either respond or file an amended complaint, but if there's
2 a way to be more efficient --

3 MR. OBERLANDER: Oh, there most certainly is, if
4 you'll forgive me, maybe --

5 THE COURT: That's fine, please.

6 MR. OBERLANDER: Okay. I think -- I assume we all
7 understand it's implicit that I disagree with how he
8 characterized the law, right?

9 THE COURT: Yes. We all understand that, and we'll
10 read about it in the papers.

11 MR. OBERLANDER: We're past that.

12 THE COURT: Yes.

13 MR. OBERLANDER: It isn't my job in a complaint to
14 satisfy anything about limitations periods. It's an
15 affirmative defense or it's a jurisdictional objection. It
16 isn't my job to deal with it. Now, I wrote a legally proper
17 complaint, but -- and I can be better, like we all can. I do
18 an extensive amount of consulting in civil RICO, and there are
19 two kinds of RICO complaints, bad ones and really long,
20 complicated ones, I'm afraid, and that's just the way it is.

21 But what there isn't ever, you're never going to find
22 it. It's come up two times in reported cases in 30 years, is a
23 RICO complaint brought by a plaintiff who was the criminal
24 victim of the defendant who pled guilty to actual information
25 setting everything out. So as a very brief statement here,

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1 I've got an 86-page grand jury indictment of Alfred Palagonia,
2 which lists Felix Sater and Sal Lauria as unindicted
3 coconspirators. By definition, what's in there satisfies
4 Twombly and, is it, Iqbal?

5 THE COURT: Twombly and Iqbal.

6 MR. OBERLANDER: Whatever it is, it by definition
7 satisfies that because somebody had to think there was probable
8 cause to return that. And in there, whoever wrote it, this is
9 the organization, this is the conspiracy. Why would I --

10 THE COURT: Let's just -- I'm going to stop you here.

11 MR. OBERLANDER: Okay. You want me to --

12 THE COURT: This sounds like more argument about why
13 your pleading is sufficient.

14 MR. OBERLANDER: To speed it up, I can speed it up, if
15 you could rule with preliminary papers, however you could do
16 it, on the statute of limitations issue, which is law bound,
17 there's not a whole lot of factual dispute in there. He says
18 conviction becomes final means 1998. I say it means 2009. You
19 know, if you really want the truth, the way to speed this up is
20 to get rid of that issue because if you rule that the statute
21 of limitations ran out in 2002, why am I amending a substantive
22 pleading where there is no time to do it?

23 THE COURT: Well, and frankly, the Twombly and Iqbal
24 motions, although I've granted one in my short tenure on the
25 bench, usually they are something attorneys feel compelled to

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1 make. But Twombly and Iqbal are not as exacting as people
2 might fear.

3 So, but as I recall, though, the issue was not just
4 the Twombly, Iqbal, and as I just heard from counsel, there's
5 also the issue of substantive RICO and predicate, the predicate
6 defense issue, and as I recall, there were two other RICO
7 issues that you didn't mention in your argument but that are in
8 your papers. You don't need to go into them now.

9 So I think the most efficient thing to do is to go
10 ahead with the motion to dismiss. I think you should put all
11 of the arguments in the motion to dismiss. In the schedule
12 that I put in place, once you get the motion to dismiss, if you
13 want to amend, and just look at the scheduling order, rather
14 than respond, you can do that.

15 But let me just suggest to everybody that the Twombly,
16 Iqbal arguments, particularly in cases where there's a lot of
17 factual information known, generally aren't successful. There
18 may be other deficiencies in the pleading, substantive law
19 deficiencies in the pleading, such as those you referred to in
20 your letter, but I wouldn't spend too much time on the Twombly,
21 Iqbal issues.

22 MR. OBERLANDER: Then I'd rather amend first, only
23 because I can make the pleading shorter and clearer, period.

24 THE COURT: As to the alleged deficiencies?

25 MR. OBERLANDER: Yes.

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1 THE COURT: Okay. By all means.

2 MR. OBERLANDER: And it just cuts a whole iteration
3 out of this.

4 THE COURT: Let's do that. Fine.

5 MR. OBERLANDER: I just thought before I even do that,
6 if he makes a motion for partial summary judgment or full on
7 the issue of statute of limitations because --

8 THE COURT: If I were confident that he was right on
9 the statute of limitations, I would say that. Frankly, I don't
10 know the law; so I would rather hear all of the arguments at
11 once. But if you are offering to make your complaint more
12 clear with respect to the alleged deficiencies, go for it. I
13 would not add a lot of detail for the sake of Twombly, Iqbal.

14 MR. OBERLANDER: No, no, other way around. All I want
15 you to do, if you'll forgive me, your Honor, is accept the
16 following, that rather than have to sit and quote 150 pages of
17 somebody else's document, there is case law in the Second
18 Circuit that says if I incorporate allegations in an indictment
19 or something by reference without attaching it to the actual
20 complaint, it's still proper.

21 If the Court would allow me to do that and say that
22 the description of the enterprise is exactly as contained in
23 paragraphs 8 through 7, without having to attach a whole thing
24 this thick to it, that would seem --

25 THE COURT: You would amend the complaint to do that?

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1 I mean, it would be hard to read in that case. I mean, if
2 there is Second Circuit case law that says you can do that, do
3 whatever Second Circuit case law says you can do. So let me
4 just make sure I understand. You do want to amend that?

5 MR. OBERLANDER: I want to amend the complaint so that
6 it becomes a paragon of short, concise RICO conspiracy pleading
7 because we are basing our case primarily on 1962-D, not C, on
8 conspiracy.

9 THE COURT: Right.

10 MR. OBERLANDER: Primarily.

11 THE COURT: Which was clear from your letter.

12 MR. OBERLANDER: And, therefore, I want to make it a
13 paragon of clarity that we are alleging that Mr. Palagonia
14 committed multiple acts of securities fraud in the operation of
15 a RICO enterprise, which is exactly what --

16 THE COURT: I understand. And that these fellows were
17 part.

18 MR. OBERLANDER: And that's all I have to get.

19 THE COURT: Okay. How soon can you file an amended
20 complaint?

21 MR. OBERLANDER: Two weeks?

22 THE COURT: Okay. So let's set that two-week date.

23 MR. OBERLANDER: Excuse me. We already have a
24 schedule. Why don't we just add --

25 THE COURT: Okay. So we'll do -- just, I need to put

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1 dates into my order. So we'll do July 30th for the amended
2 complaint, and then do you want to bump everything else by one
3 month?

4 MR. OBERLANDER: No.

5 THE COURT: No.

6 MR. OBERLANDER: The rule is 21 days. I don't care
7 how long he takes. It's with respect to 21 or 28.

8 MR. MOBARGHA: I can file a motion to dismiss in 21
9 days after that time.

10 THE COURT: Okay. So we have July 30th for the
11 amended complaint, and then we have three -- You want three
12 weeks? We can do it shorter, if you want shorter.

13 MR. MOBARGHA: No, three weeks is fine.

14 THE COURT: Okay. So that's August 20th for the
15 motion to dismiss. And then is two weeks good for a response?
16 Okay. August 20th. September 3rd for response.
17 September 10th for reply.

18 We need an initial pretrial conference. I know that
19 sounds crazy since we are here, but I would like an initial
20 pretrial conference, where you would submit a case management
21 plan and a status letter, although, I'm not sure what you'll
22 put in the status letter, but pursuant to my previous order
23 which spells all that out. Why don't we do that, why don't we
24 do it October 1st.

25 MR. OBERLANDER: May I ask a question?

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1 THE COURT: Yes.

2 MR. OBERLANDER: Much web space has been devoted to
3 the, what in my day we called the rocket docket approach of
4 your orders, including that we are supposed to be e-mailed if
5 there's a motion unresolved after 60 days.

6 THE COURT: Okay.

7 MR. OBERLANDER: The dates that you're picking here
8 are essentially so close to resolution of the motion to dismiss
9 that maybe it would be better to just hold the pretrial
10 conferences in abeyance until you dispose of that motion to
11 dismiss.

12 THE COURT: What I'm hoping to, but I can't promise
13 it, is I may be able to either hear oral argument or rule
14 orally on October 1st; so we can accomplish a lot of things on
15 that day.

16 MR. OBERLANDER: There's a reason I ask, for the sake
17 of my client's bill.

18 THE COURT: Yes.

19 MR. OBERLANDER: Which is that sometimes in securities
20 fraud cases, damage computations are very, very expensive and
21 very detailed. And when you are dealing with damages which are
22 in vicarious liability and you're saying, well, that judge
23 already ordered them to be paid a million and a half by
24 Palagonia; therefore, my damage claim against you is that
25 million and a half, that ought to do it.

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1 So I'm asking in advance that when we head into a
2 conference, which I think paragraph 5 of your seven typical
3 rules says a damage computation analogous to 26(a)(1.c.2), if
4 I'm not mistaken, that we be allowed to make it relatively
5 casual without having to spend --

6 THE COURT: Yes, that's fine. And, in fact, you
7 already have a relatively casual damages description in one of
8 these letters.

9 MR. OBERLANDER: I tried to do everything I could.

10 THE COURT: You can cut and paste it.

11 MR. OBERLANDER: Thank you.

12 THE COURT: Yes.

13 MR. MOBARGHA: Your Honor, one last issue I'd like to
14 address is some of the allegations in the complaint, I felt,
15 were scurrilous and intended only to harass and humiliate
16 Mr. Sater and his late, deceased father. So I just ask if
17 counsel does not amend and take those allegations out of the
18 amended complaint, part of my motion to dismiss, I will also be
19 filing in conjunction with it a motion to strike some of the
20 allegations in the complaint.

21 So I just wanted to give opposing counsel some advance
22 notice to use a little bit more discretion, and to actually
23 plead relevant allegations rather than a history of Russian
24 Mafia in Brooklyn, which is completely irrelevant and
25 unsubstantiated. Thank you.

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1 THE COURT: Okay. So thank you, counsel. Please, you
2 can have your discussion afterwards, but thank you. Okay. So
3 I think that's everything on this final conference. And is
4 there anything else we need to address here?

5 MR. OBERLANDER: No, I think that's it.

6 THE COURT: Okay. Thank you. From defense, anything?
7 Okay. Thanks very much.

8 MR. LISTON: Thank you.

9 (Adjourned)